Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20544

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In the Matter of	)	
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Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates	)	MM Docket No. 95-92
	)	
47 C.F.R. § 73.658(a), (b), (d), (e) and (g)	)	DOCKET FILE COPY ORIGINAL

COMMENTS OF THE UNITED PARAMOUNT NETWORK

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COMMENTS OF UNITED PARAMOUNT NETWORK

United Paramount Network ("UPN") submits these comments in response to the Commission's Notice of Proposed Rulemaking, FCC 95-254, MM Docket No. 95-92 (released June 15, 1995) ("NPRM"), in the above-captioned matter. In these comments, UPN addresses only the exclusive affiliation and time-option rules, although the network may address proposed changes to the right to reject, territorial exclusivity, and dual network rules, if appropriate, in the context of reply proceedings. It is most fitting that UPN, in its maiden comments to the FCC, champions policies designed to promote new network entry into broadcasting.

INTRODUCTION AND SUMMARY

In this rulemaking proceeding the Commission has proposed to reexamine how the government regulates the manner in which television networks and their affiliates interact. In the years since these rules were adopted,[1] the structure and economics of

1. The rules have their origin in the Commission's 1941 Chain Broadcasting Report, which addressed the structure of network-affiliate relations in radio broadcasting. Report on Chain Broadcasting, Commission Order No. 37,

television networking have undergone a dramatic transformation. Importantly, free, over-the-air broadcasting has become but one means of providing video services in an industry which now includes cable television, wireless cable ("MMDS"), and direct broadcast satellite ("DBS"), and which may soon include telephone company video services. In light of this increasing competition between network broadcasting and other video programming services, UPN heartily supports the Commission's desire to reinvigorate network broadcast television by repealing or amending regulations which unnecessarily hamper the networks' ability to provide valuable and desirable services to the public.

At the same time, however, UPN urges the Commission to recognize that while over-the-air television is one of several video delivery systems, it is the only one that remains free to the receiver, and that the health of free broadcast television depends not only upon the vitality of competition in video programming generally, but also upon the intensity of competition within network broadcasting itself. All of the network affiliation rules were imposed at a time when broadcast television was the only video service available. Some of those rules were behavioral in character, designed to inhibit the exercise of an oligopoly power which was dependent upon that fact. Other of those rules, like the two rules addressed by UPN in this rulemaking, were structural in nature and had as a distinct purpose the promotion of competition within network broadcasting itself, by assuring new entrants

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Docket No. 5060 (May, 1941), modified, Supplemental Report on Chain Broadcasting (October 1941), appeal dismissed sub nom. NBC v. United States, 47 F. Supp. 940 (S.D.N.Y. 1942), aff'd, 319 U.S. 190 (1943) ("Chain Broadcasting Report"). Though first applied to radio, the rules were extended to television, without additional inquiry or proceeding, in 1946.

access to an industry with significant structural barriers to entry created by the Commission's spectrum allocation policies.

Even as network broadcasting faces competitive challenges from outside the traditional broadcast realm, healthy competition among networks -- fostered by mitigating the effects of artificial barriers to entry -- remains as critical today as it was during the first thirty years of broadcasting, when three networks constituted the broadcast network industry. In the absence of the two rules discussed here, which serve to preserve rules of fair play between established and emerging networks, the creation of a fourth network could not have been possible. Nor, indeed, could the premiere of a fifth, sixth or (possibly) seventh network.

Only with coverage of over 80 percent of U.S. television households can an emerging network compete for advertisers in the national advertising marketplace. At present, because there are insufficient stations in a critical number of markets to support a fifth network -- let alone a sixth -- on primary affiliations alone, UPN has attained viability *only* through reliance upon secondary affiliations in many markets.[2] Absent its ability to

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2. A network's national reach may be built upon both primary and secondary affiliations. A primary affiliate is a full-power station that takes all or substantially all of a network's offered programming and carries that programming "in pattern" (on the same day and date as the majority of other stations nationwide). A secondary affiliate may take all or very little of a network's programming but carries it out of pattern (on different days or at random hours). As discussed below, primary affiliations are critical to a network because they permit the network to offer national advertisers the guarantee of national delivery and of predictable demographic audience groups that they require. Furthermore, advertisers pay a premium for primary coverage rather than secondary because the guarantee of time, day and date assures that they will reach their targeted audience.

obtain secondary affiliations, UPN's coverage today would be reduced to 72 percent of homes nationwide, a number well below that necessary to attract the national advertising base sufficient to become a viable broadcast network. Indeed, until any emerging network can reach over 80 percent coverage through primary affiliations, that network is dependent on carriage of its programming by stations primarily affiliated with another network. Once the new network is in existence, however, that fact alone will create incentive for new broadcast stations to be built in small and medium size markets. In turn, those stations are available to become primary affiliates. Given the structural reality of limited stations per market, access to secondary affiliates is a critical precondition to new network entry today. Secondary affiliations serve as a transitional, entry-enhancing mechanism for new networks.

The exclusive affiliation rule[3] is the sole assurance that an emerging network will not be systematically and structurally barred from access to stations in the critical number of markets initially needed to reach a national audience. By preventing each of the four established networks from contractually prohibiting their affiliates from broadcasting programs from new networks, the rule simply provides incipient networks with the opportunity to compete with established players for program clearance, thereby expanding the range of options presented to the public. Likewise, the time-option rule,[4] as it is written today, prevents the major networks from blocking new competitors through the alternative route of optioning a station's non-network time, precluding, for all practical purposes, that station from airing the programs of another network.

3. 47 C.F.R. § 73.658(a).

4. 47 C.F.R. § 73.658(d).

UPN urges the Commission to retain the exclusive affiliation and time-option rules, for without their protection UPN's existence as an emerging fifth network would be tenuous at best. Consistent with the need to promote competition and assure the opportunity for new entry, however, UPN further proposes a modification of the time-option rule to permit limited time-optioning by truly incipient networks. UPN agrees with the Commission's observation, in the NPRM, that time-optioning can be a valuable tool permitting new networks to plan and grow with greater certainty and stability. As the Commission works to promote unfettered competition within free broadcast television, it is appropriate to recognize the obvious differences between established and emerging networks in weighing the competitive benefits -- and the risks and potential for abuse -- inherent in time-optioning practices.

DISCUSSION

I. The United Paramount Network

The United Paramount Network premiered on January 16, 1995 as an emerging fifth national network. Compared to the four established networks, United Paramount is today a small, determined newcomer. In the Fall 1995 season, UPN provides four hours of programming per week in prime time, as well as two hours on Saturday afternoon and an hour of children's programming on Sunday mornings. The network has attained national coverage of 91 percent, a combination of approximately 72 percent coverage through primary affiliation and approximately 19 percent coverage through secondary affiliation.[5] Though UPN intends to grow, to reach the entire country and to provide a full 7-day schedule of programs, today the network's presence on the air is wholly contingent upon its access to secondary affiliations in the 71 markets necessary to reach 19 percent of viewers nationwide. To date, UPN has been unable to obtain even secondary affiliates in 60 markets, serving the final 9 percent of the country.

II. Vigorous Competition In Broadcast Television Demands The Preservation Of Avenues For Entry

A. The Emergence Of New Video Services Does Not Obviate The Need For Competition Among Broadcasters

In this and other recent proceedings, the Commission has repeatedly focused upon the importance of the health of traditional broadcast television, as other forms of video programming have emerged.[6] The Commission's interest in strengthening free television

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5. These figures should be compared to a range of 15-22 hours of prime time programming, and approximately 38-95 hours of programming weekly, by each of the established networks (ABC, CBS, NBC, and Fox), which reach roughly 99 percent of the country's households. Only Fox relies significantly upon secondary affiliations, necessary to reach approximately 5 percent of its coverage. Historically, and particularly in its earliest years, Fox relied substantially upon secondary affiliates in order to obtain national coverage. See e.g., Geoff Foisie, The Reach of Fox: Almost a Network, Broadcasting 42 (Jan. 28, 1991). In addition, Fox today obtains a small percentage of its coverage from the Fox Net Cable Service.

6. See, e.g., NPRM at ¶ 59 ("To ensure that free, over-the-air television remains a viable programming source in the years to come, we believe it is imperative to review how we regulate the broadcasting industry and to remove unnecessary regulatory restraints."); Further Notice of Proposed Rulemaking, MM Docket No. 91-221 (released Jan. 17, 1995) at ¶ 7 (acknowledging Commission's belief that network ownership and affiliate rules "needed to be amended in order to strengthen the potential of over-the-air television to compete in the current video marketplace and enhance its ability to bring increased choice to consumers.").

through deregulation stems from the development of strong competition in the video marketplace in the form of cable, wireless and DBS services, as well as the promise of video dialtone. Indeed, the range of broadcast, cable, and other video options available to the public has increased dramatically over the last decade, with a concomitant decline in network television's market share of viewing and of television revenues.[7] The Commission has rightly recognized that many of the regulatory restrictions historically imposed upon networks were adopted in a far less competitive environment; in a changed industry, where broadcast networks face competition from new alternative video services providers, continued application of these rules may "no longer [be] justified and may impede the provision of broadcast services." OPP Working Paper at 3999. Aware that the emergence of new video service competition imposes a form of free-market regulation of its own, the Commission has undertaken extensive review of network broadcast rules -- rules which were imposed when free broadcast was the exclusive actor in the market.[8] It has done so on two premises:

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7. In 1991, the Office of Plans and Policy reported that, "[over the prior fifteen years,] [b]roadcast television . . . has suffered an irreversible long-term decline in audience and revenue share, which will continue through the current decade." Office of Plans and Policy, Broadcast Television in a Multichannel Marketplace, Working Paper No. 26, June 1991, at 3999 ("OPP Working Paper"). The Second Report and Order in the financial interest and syndication rules proceeding provided figures quantifying this decline: from 1975 to 1992, the networks' aggregate share of prime time viewing dropped from 93 to 59 percent. And in the years between 1989 and 1992, the network share of television advertising revenue declined from 35 to 32.5 percent. Second Report and Order, MM Docket No. 90-162, 8 FCC Rcd. 3282, 3303-04 (released May 7, 1993) (fin/syn proceedings).

8. In particular, within the last year alone, the Commission has: (1) repealed the prime time access rule, clearing the way for networks to provide a full schedule of prime time programming; (2) repealed the financial interest and syndication rules, thus permitting networks to engage freely in the financing,

(1) a lighter regulatory touch is needed to assure that broadcasters can effectively compete in the new competitive environment in which broadcasting operates, and (2) increased competition within the broadcasting field itself is needed to make broadcasting a more vigorous competitor in that larger environment. Thus, even as the Commission seeks to lift regulations which hamper broadcast television's ability to compete in the expanded video marketplace, it has recognized its long-held duty to foster competition within the broadcasting industry itself.

B. The Commission Historically Has Sought To Mitigate The Barriers To Competition In Broadcasting Caused By Its Spectrum Allocation Policies

The history of the Commission's study of network practices documents an overarching concern that the Commission's own historic spectrum allocation policies, while otherwise serving the public interest, had unwittingly impeded the growth of new broadcast networks and, derivatively, competition within the broadcast industry itself.[9] Indeed, much

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ownership, and syndication of television programs; (3) repealed the network station ownership rule, which had imposed restrictions on the type of markets in which networks could own stations; (4) undertaken review of the national ownership, duopoly, and cross-ownership restrictions; and (5) undertaken review of the network advertising representation rule, which has prohibited networks from representing their affiliates in the sales of national spot time. Previously, the Commission repealed the rule limiting network affiliation agreements to a term of two years.

9. In 1980, the Final Report of the Network Inquiry Special Staff concluded that the Commission's spectrum management policies served as an effective bar to new network entry; for example, the Commission chose to allocate only limited portions of the VHF and UHF bands, and it intermixed UHF and VHF stations within the same markets, placing the UHF stations in a handicapped competitive situation. More importantly, the Commission followed a policy of localism and community-based assignments, severely circumscribing the number of outlets in any given geographic area. Network Inquiry Special Staff, New Television Networks: Entry, Jurisdiction, Ownership and

of the impetus to lift restrictions hindering the growth of alternative video services came from a reluctant recognition that the FCC's spectrum allocation policies prevented intra-broadcast competition in the form of new network entrants. Today, with the emergence of potential new network entrants, it remains essential that the FCC continue to pursue policies that mitigate the adverse competitive effects created by its historic spectrum allocation and assignment policies.

C. Open Competition Among Broadcast Networks Remains A Critical Policy Goal

The promotion of competition among broadcast networks is a cornerstone of the Commission's mandate to regulate in the public interest.[10] The Network Inquiry

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Regulation (Oct. 1980) ("Network Inquiry Report"). As the lead author of the Network Inquiry Report recounted:

> In brief, the FCC initially exercised its spectrum allocation and assignment powers in a manner that almost guaranteed that no more than three full-scale, advertiser supported nationwide networks that employed conventional broadcast stations as local outlets would arise.

Thomas G. Krattenmaker, Telecommunications Law and Policy 233 (1994), quoting Stanley M. Besen, Thomas G. Krattenmaker, A. Richard Metzger, and John R. Woodbury, Misregulating Television 4-19 (1984). These sentiments echoed earlier conclusions. As the Commission's 1957 Network Broadcasting Report concluded, the Commission's allocation policies had caused structural barriers to entry that assured that "networking will continue to be characterized by a small number of firms . . . without the possibility that new networks will be able to enter and compete . . . ." Network Broadcasting, Report of the Network Study Staff to the Network Study Committee 637 (Oct. 1957), reprinted in H.R. Rep. No. 1297, 85th Cong., 2d Sess. (1958) ("Network Broadcasting Report").

10. See, e.g., Report on Chain Broadcasting at 47: "[P]reservation of the fullest possible measure of competitive opportunity consistent with furnishing the public adequate broadcasting service is one of the elements to be considered in applying the statutory standard of 'public interest, convenience, or necessity.'"

Report discussed this link between broadcast network competition and the public interest, explaining, in particular, that when the Commission undertakes to evaluate network behavior, it "would be [best] advised to concentrate its attention on whether potential network entrants . . . are harmed." Network Inquiry Report at 520. This is because many of the rules seeking to restrain certain network behavior or practices are, in fact, an act of last resort; the same negative practices could be more directly controlled by the free exercise of competition within the broadcast industry. "[T]he Commission should realize that instead of seeking to ameliorate the effects of [the networks'] bargaining power by dictating certain contract terms, it could always have reduced the power directly, by adopting policies conducive to entry by additional networks." Id. at 521 (emphasis added).[11] Indeed, the Commission has consistently acted upon that advice, actively pursuing (and re-stating) its cardinal goal of "encourag[ing] the development of emerging networks."[12]

Rules protecting the fundamental competitive structure of the industry thus become even more critical as the Commission reduces its regulation of individual undesirable

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11. Indeed, the Report concluded: "Entry by additional networks will, by itself, vitiate many of the concerns that led in the past to adoption of these regulations in the first instance." Id. at 523.

12. Report and Order, 6 FCC Rcd. 3094, ¶ 159 (1991) (fin/syn proceedings) ("[P]romoting establishment of a fourth or even fifth national network has been a consistent interest of the FCC for many years."). See, e.g., Memorandum Opinion and Order, 5 FCC Rcd. 3211, ¶ 4 (1990) ("[W]e find that this action [granting Fox a limited waiver of the fin/syn rules] will advance the Commission's oft-stated public interest objective of encouraging new national networks."); Competition and Responsibility in Network Television Broadcasting, 25 FCC 2d 318, 333 (1970)("Encouragement of the development of additional networks to supplement or compete with existing networks is a desirable objective and has long been the policy of this Commission.").

practices. In a deregulatory environment, the competition engendered by open entry to new networks has at least two beneficial effects: first, it limits the exercise of market power by established market participants and thus can be relied upon to dampen the prospect of abusive market practices; second, it serves to enhance the choice, quality and diversity of programs offered to the public. As the Chain Broadcasting Report explained in the context of radio broadcasting, but in words equally resonant today:

> The benefits of competition are . . . clear in the field of network broadcasting. If national networks compete for station outlets on the basis of performance, there will be a direct incentive to improve and expand the programs . . . which they offer to the public. Likewise, if stations are not tied exclusively to a single national network over a long period of time and if stations compete for access to one or another national network . . . each will be stimulated to improve the quality of programs which it offers and hence its value as an outlet of a national network. This two-way competition--among network organizations for station outlets and among stations for network affiliation--will insure the listening public a well diversified, high-quality program service.

Chain Broadcasting Report at 47-48.

An independently healthy and vigorous broadcasting industry is a critical, and irreplaceable, component of the public interest. This is especially so when addressed in the context of the Commission's mandate to provide a national communications system available and freely accessible to all. The development of non-broadcast distribution outlets does not satisfy the Commission's goals of competitive and diverse programming services for all Americans. First, consider the diversity of programming created by broadcast television: in particular, broadcasters are still the only universal and free source of local news and public affairs programs. Second, consider the availability of other services: though cable is the most widely available alternate video service, passing nearly 96 percent of homes nationwide, more than a third of those eligible either cannot afford to or choose not to subscribe. And though there are now several for-subscription multi-channel providers of video services, their availability and penetration rates are so low that the Commission recently concluded it would be inappropriate to consider those services as relevant substitutes for a majority of Americans.[13] Even with cable penetration, approximately 35 million households, or 37.5 percent of Americans, rely upon free television broadcasting as their sole source of video services. Certainly, then, ensuring the availability of free and universal programming, through an open and competitive market for broadcasting television, remains an overriding policy objective.[14]

II. Continuing Barriers To Entry Assure That The Rationale Behind The Exclusive Affiliation And Time-Option Rules Is Still Compelling

As the Commission has recognized, "[f]ree competition in any enterprise exists only when the field is open to everyone." Chain Broadcasting Report at 48. The critical question for the Commission today, then, is whether the structure of television broadcasting

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13. As of last year, wireless cable services reached just over one-half million viewers. An additional four million households own a home satellite dish, and one million subscribe to satellite master antenna television systems ("SMATV"). Further Notice of Proposed Rulemaking, MM Docket No. 91-221 (released Jan. 17, 1995) at ¶¶ 24-29.

14. See OPP Working Paper at 4002 ("Viewers who do not subscribe to cable or other multichannel media will be made worse off by a decline in the quantity and quality of broadcast service."). It is for precisely this reason that a true national television network cannot be built upon a combination of only primary station affiliations, with significant coverage gaps being filled by carriage on cable. If the Commission were to repeal the exclusive affiliation rule on the belief that a combination of primary affiliation and cable coverage were sufficient to establish a fifth network, it would, in effect, be reversing its historical course of a firm, unwavering commitment to free and universal access. Seeking to supplement national coverage on cable is only a second -- or last -- resort.

is sufficiently "open to everyone" that each may compete on the merits of their programs, or whether there are still barriers within the industry limiting the number of potentially viable broadcast network competitors.[15] If incumbent firms, unregulated, can use structural barriers to their advantage, the Commission must act to assure that such anti-competitive practices are minimized. The public interest requires no less.[16]

Certainly some will argue that the increase in commercial stations over the last decade has sufficiently softened structural barriers to entry as to decrease or even obviate the need for the exclusive affiliation rule. True, the number of commercial stations nationwide has grown over the past decade, from a total of 883 in 1985 to 1,145 in 1994,[17] permitting the establishment of the "fourth broadcast network" that had been dismissed as spectrally-impossible by both the 1957 Network Broadcasting and the 1980 Network Inquiry Reports. The absolute number of stations generally, however, is not an accurate indication of the

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15. While referring to radio, but in language equally applicable to television, the Commission has found that for inter-network competition to exist, "the opportunity to engage in network broadcasting [must be] open to anyone willing to risk his capital and energy." Chain Broadcasting Report at 70.

16. Recently, the Commission set forth a framework for assessing the continuing need of another network rule. Report and Order, MM Docket No. 94-123, July 31, 1995 at ¶ 19 (reviewing the prime time access rule). First, the Commission was to assess whether the networks dominate the market relevant to the rule or, alternatively, whether they would be likely to do so in its absence. Second, the Commission was to assess the costs imposed by the rule. Finally, the Commission proposed to analyze whether the rule was necessary to promote healthy and independent programming, stations, and new networks, and to safeguard affiliate autonomy. UPN agrees that this is the proper analytical framework for assessing the network rules. The remaining sections of these comments are devoted to answering these questions as applied to the exclusive affiliation and time-option rules.

17. NPRM, Appendix C.

potential for new network entry. Network broadcast entry requires national distribution, which in turn is dependent on having broadcast outlets in each of a sufficient number of separate local markets to generate over 80 percent national coverage. It matters not to viewers in St. Louis that there are large numbers of competing stations in Los Angeles. What is important to those viewers is whether a new network's programs, which they have learned of through national publications or other national media, are found on a local station in St. Louis.

An understanding of the hurdles faced by new networks in today's market must be gleaned from an exploration of three issues: the interrelationship of coverage, advertising and economic viability; the structural limitations of local markets for affiliates; and technical and other competitive handicaps faced by new networks.

A. Coverage, Advertising, And Economic Viability

Without support from national advertisers, a network cannot raise funding for its programs. Yet the value of a national network to an advertiser lies in its ability to blanket the country with the exposure of that advertiser's product, to their desired audience, on the same day and at the same time in each market. Without a minimum assurance of reaching more than 80 percent of American homes, an emerging network will not find sufficient support in the national advertising marketplace to remain viable.[18]

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18. See, e.g., Betsey Sharkey, Anxious Parents Await the Birth of a TV Network, N.Y. Times, Jan. 15, 1995, at B-1 ("A network's lineup of affiliates is critical. Only when the shows reach 80 percent of the country, and only when a certain number of viewers tune in, will a network draw national advertisers, which provide most of the revenue."). See also David Lieberman, Network Showdown: Two Ventures Enter Race for Prime Time, USA Today, Jan. 5, 1995, at 1B; Daniel Cerone, New Year Brings Two New Networks, L.A. Times, Jan. 2, 1995, at F-1.

As the older, established networks now reach virtually 100 percent of homes nationwide (95 percent or more through primary affiliations), some advertisers simply will not consider another network to be competitive absent nearly universal coverage. Furthermore, although there are no strict mathematical formulas for pricing, advertisers will value time most highly on a particular network based upon a combination of the following factors: the network's ability to deliver an advertisement on the same day and date, in-pattern, nationwide; coverage above 90 percent; and high ratings. Any emerging network seeking to compete with the established networks is at a serious competitive disadvantage if it is unable to deliver near-universal coverage and unable to deliver what coverage it does have by means of primary affiliations.[19] In addition, no matter how highly the public values a network's programming, that network's ratings -- upon which advertisers rely -- will always be proportionally undercut by less than universal coverage. All of these factors affect profitability and long-term viability.

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19. Delivery of an advertisement on a primary affiliate permits the creation of a consistent identity among advertisers, programs and viewers. Furthermore, advertisers pay a substantial premium for delivery in pattern because it allows for carriage of time-sensitive information. For example, a studio may wish to advertise a new motion picture as "Starting Friday." Because there is no guarantee when a network's secondary affiliates may choose to carry the underlying program, carriage of that advertisement on secondary affiliates will be of little use or may, indeed, be nonsensical. Rather than risk confusion among viewers, many advertisers with similar promotional issues simply choose not to air time-sensitive material on networks with a substantial amount of coverage obtained via secondary affiliations. For similar reasons, a network's on-air promotions (e.g., "watch at 8 p.m. tonight") are potentially meaningless on a secondary affiliate.

Nonetheless, setting aside these factors affecting competitiveness and long-term financial viability, it is certain that without a minimum guarantee of 80 percent coverage at the outset, a new network cannot find sufficient support in the national marketplace even to premiere. In a world in which a new network cannot achieve such coverage through primary affiliations, it must of necessity rely upon secondary affiliations. Though secondary affiliations are clearly less desirable, as discussed above, they are undeniably a component of a new network's distribution. Once the new network is in existence, however, there will be substantial incentive for new broadcast stations to be built in small and medium size markets. Thus, secondary affiliations serve as a valuable transitional device, without which there would be no new network entity.

B. The Structural Limitations Of Local Markets For Affiliates

It follows that a fundamental limitation on the number of networks, and upon network entry, is the number of stations assigned to each market.[20] There are 211 relevant local markets, as measured by Nielsen. Today, each of the original three networks have over 200 affiliates. Fox has primary affiliates in more than 150 markets and an additional 40 secondary affiliates.[21] Fewer than 300 stations remain, and they are not spread evenly throughout the nation's markets. Indeed, as recently as two years ago, both ABC and INTV

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20. Local television markets are generally discussed with reference to Nielsen's Designated Market Areas ("DMAs").

21. Report and Order, MM docket No. 94-123 (released July 31, 1995) at ¶ 7.

argued before the Commission that the prospects of a fifth network were dim, if not non-existent, because of the lack of an adequate base for potential affiliates.[22]

Based on the raw data set forth in the NPRM, only 21 percent of all local markets, representing only 59 percent coverage, have the six commercial stations needed to support the two new incipient networks, UPN and Warner Brothers ("WB"). NPRM at ¶ 13. But even that overstates the actual availability of potential affiliates. Many of these stations have geographic or technical handicaps (i.e., they are remote or low-power stations); others are satellite stations or translators; finally, many of the remnants are committed to religious, foreign language, or other unique program formats that severely limit their potential as candidates for affiliation. Adjusting for these limitations, UPN has created the following chart, illustrating the number of commercially viable stations per market, with cumulative figures for coverage.

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22. Reply Comments of ABC at 18-19 and INTV at 12, 18-19; Second Further Notice of Proposed Rulemaking, MM Docket No. 90-162, 8 FCC Rcd. 223 (1992).

Total Television Coverage (VHF and UHF): Commercially Viable and Operational Stations[23]

Number of Stations	*Number of Markets*	*Cumulative Number of Markets*	*Number of TV Households (000)*	*Percentage of TV Households (%)*	*Cumulative Number of TV Households (000)*	*Cumulative Percentage of TV Households (%)*
9	1	1	4,936.18	5.2	4,936.18	5.2
8	8	9	15,394.76	16.1	20,330.94	21.3
7	4	13	7,160.72	7.5	27,491.66	28.8
6	22	35	22,988.99	24.1	50,480.65	52.9
5	36	71	18,318.61	19.2	68,799.26	72.1
4	52	123	16,976.77	17.8	85,776.03	89.9
3	40	163	6,185.39	6.5	91,961.42	96.4
2	27	190	2,454.42	2.6	94,415.84	99.0
1	21	211	945.55	1.0	95,361.39	100.0
0	0	211	0	0.0	95,361.39	100.0

In the estimate of UPN, were there only one emerging network seeking to enter the business, and were that emerging network able successfully to obtain a primary affiliation with the fifth station in each and every market having a truly viable fifth broadcast outlet, that network would then have access to just above 70 percent of the nation's households.[24] That network could then only operate below the threshold of viability. Any

23. Satellite stations, geographically remote stations and stations with specialized formats have been excluded for the purposes of this analysis.

24. Affidavit of Lucie Salhany, October 25, 1995 (attached). As the NPRM recognizes, without taking account of any of the many disqualifying features needed to assess viable commercial affiliations, only 44 percent of DMA markets, with 84 percent coverage, have more than four commercial stations. Premising the existence of a fifth network on those stations alone requires the assumption that the network could obtain an affiliate in each of those markets, as well as the assumption that each of those stations is commercially feasible.

network constrained to less than 80 percent coverage nationwide, with no prospect for growth, would not survive. It could not, over the long term, attract sufficient advertising support to be able to invest the large sums in quality programming needed to compete with the incumbent networks. And, of course, the prospects for a sixth or seventh network would be even bleaker as even fewer markets, reaching an even smaller percentage of American homes, would have an additional viable broadcast affiliate.

C. The Technical And Other Competitive Handicaps Faced By Emerging Networks

The discussion above has focused only on the insufficient quantity of stations for primary affiliations. The numerical limitation is paramount, for if there are markets with no stations available for affiliation at all, a potential new entrant will simply be excluded from access to that portion of the population. Technical comparability -- or a lack of equivalence in station facilities -- is a second handicap faced by emerging networks.

The tenuous existence faced by emerging networks dependent solely on primary affiliations is all the more apparent if one limits consideration to markets with more than four VHF stations. Only 4 percent of DMA markets, with only 17 percent coverage, satisfy this criterion. NPRM at ¶ 12. As these numbers indicate, the vast majority of any new entrant's affiliates will be UHF stations. Presently 81 percent of UPN's affiliates are UHF stations. Naturally, Fox initially affiliated with the strongest UHF independents in each market, leaving later entrants to struggle with weaker stations.

See also Mediaweek, Aug. 1, 1994, at 5 (quoting WB President Jamie Kellner that the bottom 125 markets, representing almost 20 percent of the country, have four or fewer stations).

Though improvements in tuning and reception have slightly decreased the historical VHF/UHF technical disparity, a substantial UHF handicap undeniably remains. On the technical side, UHF stations must broadcast at higher power levels, incurring substantially higher costs, in order to transmit what is still a weaker picture. This gap in reception quality is still vividly apparent to more than a third of the nation's households who do not subscribe to cable services. UHF stations also have higher, and more dispersed, channel locations, so that viewers are less likely to flip to a given UHF station than they are to a VHF station. Finally, because of the technical differences, UHF signals are less capable of reaching all of the cable head-ends in a given market. Without an acceptable signal, cable carriage is impeded and those houses subscribing to cable will not receive access to the station's programs.

These technical disadvantages translate into a substantial commercial handicap. Thus, the identical program will attract a higher audience share on a VHF rather than a UHF station;[25/] likewise, historically there has been substantial disparity between the profitability of VHF and UHF stations.[26/]

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25. Network Inquiry Report at 76. The Commission has incorporated recognition of this audience gap between UHF and VHF stations in its rules on multiple ownership, attributing UHF stations with only 50% of the households in their markets. See 47 C.F.R. § 73.3555 (e)(3)(1).

26. OPP Working Paper at 4026 n.39.

III. The Very Existence Of UPN, As An Emerging Network, Is Dependent Upon The Access To Secondary Affiliations That Is Made Possible By The Exclusive Affiliation And Time-Option Rules

> Restrictive affiliation contracts might be tolerated if there were a dozen potential stations of comparable character in every city; they are intolerable when there are few cities which have (or can have) more than four stations of all kinds.[27]

This statement -- written more than fifty years ago and referring to the networking practices of radio broadcasters -- remains true today for television. As recently as four months ago, the Fox network, with its near-universal coverage, reminded the Commission of this fact when it requested a waiver of the alien ownership restrictions. On its behalf, the network asserted: "Unimpeded access to affiliates in major markets is essential to the success of a national network."[28]

Today, with two and possibly three new entrants in the network broadcasting industry, the need to assure open access to local broadcast affiliates is more critical than ever. The reality is that the number of potentially viable new networks exceeds the number of available broadcast outlets in all but the largest markets. This is demonstrated not only by the numbers discussed above, but also by UPN's present coverage and affiliate lineup.[29]

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27. Chain Broadcasting Report at 47.

28. Filing of Fox Television Stations Inc., BRCT No. 940201KZ, May 11, 1995, at 17. Likewise, in its recent filing in the MM Docket No. 95-90 (review of the Commission's regulations governing broadcast television advertising), Capital Cities/ABC observed that, "a network needs an effective outlet in substantially all markets." Comments of Capital Cities/ABC, Inc., MM Docket 95-90 (released Aug. 28, 1995).

29. Consider, too, the difficulty that the two emerging networks have encountered in obtaining coverage even in some of the nation's largest markets. For example, at the time of their premieres in January, neither of the new networks could obtain an affiliate (secondary or otherwise) in the Hartford-

UPN, as yet, has been unable to obtain more than 72 percent of its coverage through primary affiliations. The remainder of the country either has no access to UPN's programs, or it receives them via a secondary affiliate.[30]

In light of the virtual impossibility of obtaining a primary affiliate in sufficient markets upon a network's premiere, a fifth or sixth emerging network must have access to secondary affiliates in order to enter the business. Once in the business, and assuming adequate advertising demand, a new network will become the impetus for the entry of new broadcast stations in small and medium markets. Thus, over time, an emerging network will add primary affiliations with those new stations and become independent. Preservation of open, competitive access to secondary affiliates, therefore, is critical.

New Haven market, which ranks as the 26th market nationwide. Warner Brothers made due with a temporary, secondary affiliation, being run out of pattern, while UPN could be seen only by local viewers who subscribed to the cable carriage of UPN's Boston affiliate. Bill Keveney, Two Networks Not So Easy To Find Locally, Hartford Courant, Jan. 9, 1995, at E-1 (concluding, "The difficulty in finding a TV base in the Hartford-New Haven market is one indication of the challenges facing the new networks. Only the largest markets have an abundant supply of independent stations . . . ."). Likewise, in Buffalo, the nation's 36th market, only UPN has been able to find a secondary affiliation: even then, the station, because of its commitment to one of the established networks, "scrambles for available time slots for UPN." Alan Pergament, 'Broken Trust' Bends Believability Quotient, Buffalo News, Aug. 4, 1995, at 8C.

30. Furthermore, in light of pending congressional proposals to raise, abolish, or otherwise amend national and local ownership provisions that currently limit station ownership, it is likely that the hurdles faced by incipient networks, seeking access to individual markets, will only increase with time.